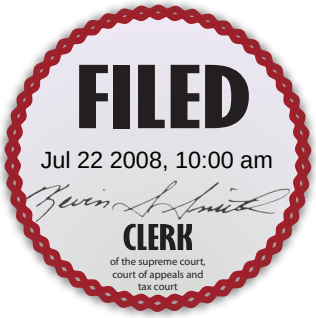

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IN THE
COURT OF APPEALS OF INDIANA

TERRY L. SHAFFER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 27A04-0712-CR-719
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE GRANT SUPERIOR COURT I
The Honorable Jeffrey D. Todd, Judge
Cause No. 27D01-0702-FB-39

July 22, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Terry Shaffer (Shaffer), appeals his conviction for child molesting, as a Class C felony, Ind. Code § 35-42-4-3.

We affirm.

ISSUES

Shaffer presents two issues for our review:

(1) Whether the trial court violated Indiana Code section 35-34-1-5 by permitting the State to amend the charging information midway through trial to add an alternative allegation; and

(2) Whether the trial court abused its discretion in instructing the jury.

FACTS AND PROCEDURAL HISTORY

The evidence most favorable to the jury's verdict reveals that Shaffer, who at all times relevant to this opinion was over twenty-one years old, began touching F.F. in a sexual manner at some point after F.F.'s thirteenth birthday on August 6, 2005. Then, in January of 2007, Shaffer had sexual intercourse with F.F., who by that time was fourteen years old. On February 12, 2007, the State filed an Information charging Shaffer with Count I, child molesting, as a Class C felony, I.C. § 35-42-4-3(b), and Count II, sexual misconduct with a minor, as a Class B felony, I.C. § 35-42-4-9(a)(1). The State alleged that the conduct giving

rise to Count I took place between January and July of 2006, when F.F. was thirteen years old.[1]

During the jury trial held on September 24-26, 2007, F.F. initially testified that the first touching took place before her eighth grade year started, after she had turned fourteen years old. (Transcript p. 132). Upon further questioning, however, F.F. testified that Shaffer first touched her "a little before school started [her] seventh grade year" or in the "middle of [her] seventh grade year" and that she "could've been" thirteen when Shaffer first touched her. (Tr. p. 135). After the State finished presenting its evidence, it orally moved to amend Count I of the charging information as follows:

> Count I: Child Molesting, a Class C felony . . . or in the alternative Sexual Misconduct with a Minor, Class C felony stating in the amended form "that between January 2, . . . 2006 an[d] August, 2006, in Grant County, state of Indiana, [Shaffer] did perform and/or submit to fondling or touching with [F.F.] a child fourteen (14) years of age or younger to-wit: thirteen (13) or fourteen (14) years of age with the intent to arouse or satisfy the sexual desires of either [Shaffer] or [F.F.]"

(Tr. pp. 351-52). The trial court granted the State's motion. Later, in instructing the jury, the trial court recited the amended Count I in Final Instruction 1 and explained the elements of both alternative charges in Final Instruction 3. The jury found Shaffer guilty as originally charged, that is, of child molesting under Count I and of sexual misconduct with a minor under Count II.[2] The trial court imposed consecutive sentences of four years on Count I and

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[1] As discussed further in Section II, child molesting involves victims under the age of fourteen, while sexual misconduct with a minor involves victims who are at least fourteen but less than sixteen. *Compare* I.C. § 35-42-4-3 (child molesting) *with* I.C. § 35-42-4-9 (sexual misconduct with a minor).

[2] On appeal, Shaffer does not challenge his conviction for sexual misconduct with a minor under Count II.

ten years with four years suspended on Count II, for a total sentence of ten years executed and four years suspended.

Shaffer now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION[3]

I. *Amendment to Charging Information*

Shaffer first argues that the trial court erred in permitting the State to amend Count I of the charging information midway through trial to add an alternative allegation of sexual misconduct with a minor because the amendment was untimely under Indiana Code section 35-34-1-5. The State concedes that the amendment was one of substance and that amendments of substance must be made before trial under the statute. However, as the State argues, this issue is moot because the jury found Shaffer guilty of child molesting as originally charged in Count I, not the alternative allegation. *Cf. Ellerman v. State*, 786 N.E.2d 788, 795 (Ind. Ct. App. 2003) (challenge to late-added charge was moot because conviction flowing from charge had been vacated). Therefore, we need not address this issue.

II. *Jury Instructions*

Shaffer also challenges the propriety of the jury instructions relating to amended Count I. Jury instructions are meant to inform the jury of the law applicable to the facts presented at trial, enabling it to comprehend the case sufficiently to arrive at a just and

[3] Several of the citations to the record in Shaffer's brief are in the following form: (App. ?????????). We surmise that Shaffer's counsel intended to eventually replace those question marks with page numbers.

correct verdict. *Hamilton v. Hamilton*, 858 N.E.2d 1032, 1035 (Ind. Ct. App. 2006), *reh'g denied, trans. denied*. Instructing the jury is left to the sound discretion of the trial court. *Id*. As such, we will review a trial court's decision only for an abuse of discretion. *Stringer v. State*, 853 N.E.2d 543, 548 (Ind. Ct. App. 2006). In evaluating the propriety of a given instruction, we consider: (1) whether the instruction correctly states the law, (2) whether there is evidence in the record supporting the instruction, and (3) whether the substance of the instruction is covered by other instructions. *Hamilton*, 858 N.E.2d at 1035-36.

Shaffer contests Final Instructions 1 and 3. Final Instruction 1 provided:

> This is a criminal case brought by the State of Indiana against [Shaffer]. [Shaffer] is charged with Count I: Child Molesting, a Class C felony or in the alternative, Sexual Misconduct With a Minor, a Class C felony. This information reads as follows:
>
> That between January 2006 and August 2006, in Grant County, State of Indiana, [Shaffer] did perform and/or submit to fondling or touching with [F.F.], a child fourteen years of age or younger, to-wit: 13 or 14 years of age, with the intent to arouse or satisfy the sexual desires of either [Shaffer] or [F.F.], all of which is contrary to the form of the statutes in such cases made and provided by I.C. 35-42-4-3(b) or I.C. 35-42-4-9(b)(1) and against the peace and dignity of the State of Indiana.

(Appellant's App. p. 41). Final Instruction 3 provided:

> The crime of child molesting is defined by law as follows:
>
> A person who, with a child under fourteen (14) years of age, performs or submits to any fondling or touching, of either the child or the older person with intent to arouse or to satisfy the sexual desires of either the child or the older person, commits child molesting, a Class C felony.
>
> The crime of sexual misconduct with a minor is defined by law as follows:

Obviously, the "citations" provided to us were of no assistance, so we urge counsel to more thoroughly review his future submissions to this court.

A person at least eighteen (18) years of age who, with a child at least fourteen (14) years of age but less than sixteen (16) years of age, performs or submits to fondling or touching, of either the child or the older person, with the intent to arouse or satisfy the sexual desires of either the child or the older person, commits sexual misconduct with a minor, a class D felony. The offense is a class C felony if it is committed by a person at least twenty-one (21) years of age.

Before you may convict [Shaffer] of child molesting, the State must have proved each of the following beyond a reasonable doubt:

1. [Shaffer]
2. knowingly
   (a) performed any fondling or touching of [F.F.] and/or submitted to any fondling or touching by [F.F.]
   (b) with the intent to arouse or satisfy the sexual desires of [F.F.] or [Shaffer]
3. when [F.F.] was a child under fourteen (14) years of age.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find [Shaffer] not guilty of child molesting, a Class C felony, charged in Count 1.

In the alternative, you may convict [Shaffer] of sexual misconduct with a minor charged in Count 1. Before you may convict [Shaffer] of sexual misconduct with a minor, the State must have proved each of the following beyond a reasonable doubt:

1. [Shaffer]
2. knowingly
   (a) performed any fondling or touching of [F.F.] and/or submitted to any fondling or touching by [F.F.]
   (b) with the intent to arouse or satisfy the sexual desires of [F.F.] or [Shaffer]
3. when [F.F.] was at least fourteen (14) years of age but less than sixteen (16) years of age
4. and at the time of the occurrence [Shaffer] was at least twenty-one years of age.

If the State failed to prove each of these elements beyond a reasonable doubt, you must find [Shaffer] not guilty of sexual misconduct with a minor, a Class C felony charged in Count 1.

(Appellant's App. pp. 43-45). Shaffer concedes that Final Instructions 1 and 3 are supported by evidence in the record and that the substance of the instructions was not covered by other instructions. *See Hamilton*, 858 N.E.2d at 1035-36. However, he contends that the

instructions "do not correctly state the law" and that they were "confusing to the jury." (Appellant's Br. pp. 19-20).[4] We disagree.

First, the instructions did not misstate the law. Final Instruction 1 was not even a statement of law; it was merely a recitation of amended Count I. As for Final Instruction 3, it included all of the statutory elements of child molesting and all of the statutory elements of sexual misconduct with a minor and informed the jury that it could not find Shaffer guilty of either crime unless the State proved the elements of one of them beyond a reasonable doubt. Furthermore, even if we assume that the trial court erred in allowing the State to amend the charging information to include the allegation of sexual misconduct with a minor (which, as discussed in Section I, is a moot issue), that would not change the fact that Final Instructions 1 and 3 correctly stated the law.

Second, we fail to see how the instructions would have confused the jury. F.F. testified at trial that she was fourteen when Shaffer first touched her but that she "could've been" thirteen. (Tr. p. 135). As such, a clarifying instruction distinguishing child molesting and sexual misconduct with a minor was necessary. If the jury determined that Shaffer committed the alleged acts with the requisite intent and that F.F. was thirteen when Shaffer did so, then Shaffer was guilty of child molesting. *See* I.C. § 35-42-4-3. If the jury

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[4] Part of Shaffer's argument in this regard is that Final Instructions 1 and 3 "make it appear as though Sexual Misconduct with a Minor, a Class C felony is a lesser included offense of Child Molesting, a Class C felony and can, therefore, be included in the same charging information." (Appellant's Br. p. 19). The State contends that Shaffer has waived any challenge he may have had to the jury instructions because he did not object on this specific ground during trial. While the State is correct that Shaffer did not make this particular argument at trial, this is not the heart of his argument on appeal. Rather, the primary point of his argument on appeal is that the instructions did not correctly state the law and that they were confusing to the jury. Shaffer

determined that Shaffer committed the alleged acts with the requisite intent, that he was at least twenty-one when he did so, and that F.F. was fourteen when he did so, then Shaffer was guilty of sexual misconduct with a minor. *See* I.C. § 35-42-4-9. Final Instructions 1 and 3 made this distinction clear. In particular, Final Instruction 3, as the State notes, "specifically shows the jurors that the crimes have distinct age requirements, but are otherwise identical as charged." (Appellee's Br. p. 8). So, while the trial court may have erred in allowing the State to amend the charging information to add the sexual misconduct with a minor allegation in the first place (which, again, is a moot issue), the instructions it gave on the two alternative charges were not confusing. Rather, the challenged instructions enabled the jury to comprehend the case sufficiently to arrive at a just and correct verdict. *See Hamilton*, 858 N.E.2d at 1035. The trial court did not abuse its discretion in giving Final Instructions 1 and 3 to the jury.

CONCLUSION

Based on the foregoing, we conclude that any issue regarding the trial court's decision to allow an amendment to the charging information is moot and that the trial court did not abuse its discretion in instructing the jury.

Affirmed.

BAKER, C.J., and ROBB, J., concur.

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preserved this alleged error at trial by asserting that the instructions "may very well create . . . unnecessary confusion among the jury as to what the issues are[.]" (Tr. p. 354).